No. 18-966

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. In furtherance of these goals, Judicial Watch is committed to the enforcement of the National Voter Registration Act ("NVRA"). Judicial Watch regularly files *amicus curiae* briefs and lawsuits related to its enforcement. *See, e.g., Judicial Watch, Inc. v. Logan*, No. CV-17-8948-R, 2018 U.S. Dist. LEXIS 151333 (C.D. Cal. Sep. 5, 2018) (NVRA Section 8 lawsuit against California and Los Angeles County); *Judicial Watch, Inc. v. Grimes*, No. 3:17-cv-94, 2018 (E.D. Ky. Nov. 14, 2017) (NVRA Section 8 lawsuit against Kentucky); *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919 (S.D. Ind. 2012) (NVRA Section 8 lawsuit against Indiana).

The Allied Educational Foundation ("AEF") is a 501(c)(3) nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and

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[1] Judicial Watch states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amici* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Judicial Watch sought and obtained the consent of all parties to the filing of this *amicus* brief.

has appeared as an *amicus curiae* in this Court on a number of occasions.

Together, *amici* share an interest in the enforcement of the NVRA. *Amici* believe that including a citizenship question on the decennial census would materially assist in the enforcement of Section 8 of the NVRA. *Amici* urge this Court to reverse the judgment of the District Court.

SUMMARY OF ARGUMENT

Citizenship data is critical to enforcing federal voting laws. In the experience of Judicial Watch, citizenship data is essential to its efforts to enforce Section 8 of the National Voter Registration Act of 1993 ("NVRA"), which requires states to remove ineligible registrants from their voter rolls. The first step in investigating compliance with Section 8 is to compare the number of voter registrations reported by a jurisdiction with the number of citizens in that jurisdiction who are old enough to vote. Where the resulting registration rate exceeds 100%, there is good reason to believe that the voter rolls contain many outdated or ineligible registrations. The relevance of using citizenship data in this way to enforce the NVRA has been acknowledged by private litigants, by the Department of Justice, and by federal courts. Citizenship data is also essential to the Department's enforcement of both Section 2 (denial or abridgment of the right to vote on the basis of race) and Section 203 (the language-minority provisions) of the Voting Rights Act of 1965.

The decennial census is sent to every household in the United States, and it generates an enormous number of responses. It is little wonder that federal courts presume the accuracy of data derived from the decennial census. In particular, federal courts favor data from the decennial census over data gathered by the much smaller American Community Survey, the current source for citizenship statistics.

Adding a citizenship question to the decennial census would generate a massive amount of new data concerning the numbers of citizens and noncitizens in U.S. states and counties. All data has limitations, and all data requires a context in which it may be properly understood. But it cannot be the case that we are better off with *less* data. The mountain of new data generated by the decennial census question will assist private litigants and the Department of Justice in their efforts to enforce the NVRA.

Amici respectfully submit that, unless the Court reverses the judgment of the District Court, the enforcement of Section 8 of the NVRA and other federal voting rights laws will be materially impaired for at least ten years.

ARGUMENT

I. Enforcement of Federal Voting Laws Depends on Citizenship Data.

A. Citizenship Data Is Critical to the Enforcement of Section 8 of the NVRA.

Amicus Judicial Watch interprets its core mission of promoting accountability, transparency and integrity in government and fidelity to the rule of law to include the pursuit of election integrity. Toward this end, Judicial Watch has an active program to enforce the voter list maintenance provisions of the NVRA.

Section 8 of the NVRA requires each state to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . the death of the registrant; or . . . a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4). It also provides for removals "at the request of the registrant," or under a state law concerning a disqualifying "criminal conviction or mental incapacity." *Id.*, § 20507(a)(3). Private parties may sue to enforce the NVRA. *Id.*, § 20510(b).

Judicial Watch's efforts to enforce Section 8 begin anew in June of each odd-numbered year, when the U.S. Election Assistance Commission ("EAC") is required by law to release a report regarding state voter registration practices. 52 U.S.C. § 20508(a)(3). The EAC report is based on a state-by-state survey of voter registration practices and statistics. Federal

regulations require states to provide information responsive to this survey. 11 C.F.R. § 9428.7.

Judicial Watch compares the EAC's survey results to data from the American Community Survey ("ACS") to determine whether states or counties have excessive registration rates, which may indicate that their voter rolls contain significant numbers of ineligible registrants. Judicial Watch is particularly interested in identifying jurisdictions that have more voter registrations than resident citizens of voting age—in other words, registration rates exceeding 100% of those who lawfully *could* register and vote. Although any registration rate higher than national or historical averages is noteworthy, registration rates greater than 100% are intuitively understood to be excessive, by courts, by the public, and even by states and counties, which hesitate to defend them.

In such a study it is important to compare registration rates to the *citizen* voting-age population ("CVAP"). Relying on voting-age population ("VAP") instead, without qualifying for citizenship, is inadequate. VAP includes noncitizens over the age of 18 who cannot lawfully register or vote. Because VAP is a larger denominator, comparing the number of voter registrations to VAP makes high registration rates appear lower, and hence more reasonable, than they are.

In both 2015 and 2017, following the release of the EAC's biennial report, Judicial Watch hired a professional demographer to compare the number of registrations to the CVAP in every county and state covered by the NVRA for which registration data was

available.[2] The results of these studies strongly suggest that there is a need for better enforcement of Section 8 of the NVRA. Judicial Watch's last study in 2017, for example, revealed that 462 U.S. counties—about one out of every six counties where data was available—had voter registration rates exceeding 100% of the age-eligible citizenry.[3]

After reviewing the results of these studies, Judicial Watch sends letters to states and counties notifying them of potential violations of Section 8 and seeking further information about their list maintenance practices. Following their 2017 study, Judicial Watch sent such notice letters to 12 states containing 114 counties with registration rates exceeding 100%.[4] Where responses to such letters are

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[2] Judicial Watch plans to repeat this study when the new EAC report is released in June 2019.

[3] Robert D. Popper, Testimony before the Presidential Advisory Commission on Election Integrity (Sep. 12, 2017), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-written-statement-robert-popper.pdf.

[4] Press Release, Judicial Watch, Judicial Watch Warns California to Clean Voter Registration Lists or Face Federal Lawsuit (Aug. 4, 2017), https://www.judicialwatch.org/press-room/press-releases/judicial-watch-warns-california-clean-voter-registration-lists-face-federal-lawsuit/; Press Release, Judicial Watch, Judicial Watch Warns 11 States to Clean Voter Registration Lists or Face Federal Lawsuit (Apr. 11, 2017), https://www.judicialwatch.org/press-room/press-releases/judicial-watch-warns-11-states-clean-voter-registration-lists-face-federal-lawsuit/.

deemed inadequate, Judicial Watch will commence a private lawsuit to enforce Section 8 of the NVRA.

The citizen registration rate constitutes an important fact in any Section 8 lawsuit. Judicial Watch's complaints typically include allegations that voter registrations exceed CVAP. *See* Complaint at 7, ¶ 26, *Judicial Watch, Inc. v. Logan*, No. CV-17-8948-R, (C.D. Cal. Dec. 13, 2017), ECF No. 1 ("according to data provided to and published by the EAC, Los Angeles County has a registration rate of 112% of its adult citizen population."); *id.*, ¶ 27 ("The entire State of California has a registration rate of about 101% of its age-eligible citizenry."); Complaint at 5, ¶16-17, *Judicial Watch, Inc. v. Grimes*, No. 3:17-cv-94 (E.D. Ky. Nov. 14, 2017), ECF No. 1 ("the number of voter registrations exceeds the number of age-eligible citizens in 48 Kentucky counties, or 40% of all Kentucky counties"). The Department of Justice makes similar allegations in its own Section 8 complaints. *See* Complaint at 6, ¶ 17, *U.S. v. State of Maine*, No. 1:06-cv-86-JAW (D. Me. July 28, 2006), ECF No. 1 ("In over half of Maine's 503 voting jurisdictions, the number of registered voters exceed the number of citizens of voting age."). And federal courts have recognized that such allegations form part of a valid claim for a violation of Section 8. *See Am. Civ. Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 793 (W.D. Tex. 2015) (upholding denial of motion to dismiss NVRA complaint alleging, among other things, that "voter rolls maintained by the Defendant contain more voters registered to vote than there are citizens eligible to vote"); *Voter Integrity Project NC, Inc. v. Wake Cnty. Bd. of Elections*, 301 F. Supp. 3d 612, 618 (E.D.N.C. 2017) (denying motion to

dismiss where complaint alleged voter rolls contained "more registrants than eligible voting-age citizens").

Judicial Watch's program to enforce Section 8 has achieved notable successes. Judicial Watch remains the only private litigant to enter into a statewide settlement agreement to enforce Section 8 of the NVRA, which it has done three times, in Ohio, Kentucky, and California (also settling with Los Angeles County). Joint Stipulation of Dismissal, *Judicial Watch, Inc. v. Husted*, No. 2:12-cv-792-EAS-TPK (S.D. Oh. Jan. 13, 2014), ECF No. 24[6]; Consent Judgement, *Judicial Watch, Inc. v. Grimes*, No. 3:17-cv-94 (E.D. Ky. July 3, 2018), ECF No. 39; Plaintiffs' Notice of Final Settlement & Settlement Agreement, *Judicial Watch, Inc. v. Logan*, No. CV-17-8948-R (C.D. Cal. Dec. 13, 2017), ECF Nos. 96, 96-1. In addition, a Judicial Watch lawsuit against Indiana became moot by virtue of the State's list maintenance efforts during the course of the lawsuit. *See* Plaintiffs' Motion for Voluntary Dismissal With Prejudice, *Judicial Watch, Inc. v. King*, No. 1:12-cv-800-WTL-TAB (S.D. Ind. June 3, 2014), ECF No. 90.

While effective, Judicial Watch's Section 8 program requires a considerable investment of institutional resources. The demographic study Judicial Watch sponsors every other year costs thousands of dollars. NVRA lawsuits are fact- and witness-intensive. Judicial Watch paid for expert

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[6] The text of the Ohio settlement agreement is available here: *Judicial Watch, Inc. v. Husted*, No. 2:12-cv-792-EAS-TPK (S. D. Oh. Jan. 13, 2014), *available at* https://www.scribd.com/document/198544915/OH-Final Agreement-Signed-by-JC-Ohio.

reports in Ohio and Indiana. In California, Judicial Watch retained three experts in anticipation of trial, reviewed tens of thousands of pages of documents produced during discovery, and, at the time the case settled, had filed a motion for leave to take up to 30 depositions of fact witnesses. *See* Plaintiffs' Notice of Motion and Motion for Leave to Take Additional Depositions, *Judicial Watch, Inc. v. Logan*, No. CV-17-8948-R (C.D. Cal. Aug. 14, 2018), ECF No. 83. Notwithstanding the expense, there is a pressing need for greater enforcement of the NVRA. Judicial Watch's biennial studies concerning national registration rates show widespread noncompliance with Section 8.

If Judicial Watch, other private litigants, and the Department of Justice could access the huge store of data that would result if a question about citizenship were included in the decennial census, the money spent enforcing the NVRA would be used more efficiently. More and better enforcement should lead to more and better compliance.

B. Citizenship Data is Critical to the Enforcement of Sections 2 and 203 of the Voting Rights Act.

As the Petitioners point out, the Department of Justice stated that citizenship data was "critical" to its efforts to enforce Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301. Cert. Pet. 3. The Department is unquestionably correct. As a matter of law and practice, CVAP data is critical to enforcing Section 2 of the Voting Rights Act of 1965. *See Bartlett v. Strickland*, 556 U.S. 1, 9 (2009) (plurality

opinion) (upholding North Carolina Supreme Court's determination that plaintiffs did not meet the preconditions for a vote-dilution claim under Section 2 where their minority group did not "constitute a numerical majority of *citizens of voting age*" in a proposed district), quoting *Pender Cnty. v. Bartlett*, 361 N.C. 491, 507 (N.C. 2007) (emphasis added); *see also* Complaint at 4, ¶ 18, *United States of America v. Eastpointe*, No. 1:06cv86 (E.D. Mich. Jan. 10, 2017), ECF No. 1 (Department's latest Section 2 complaint alleging that the "black community of Eastpointe is sufficiently numerous and geographically compact to constitute a majority of the citizen voting-age population in one single-member district").

Accurate citizenship data is also vital in enforcing the language-minority provisions of Section 203 of the Act, which may apply where 5% or 10,000 of a jurisdiction's "citizens of voting age" are "limited-English proficient." 52 U.S.C. § 10503. More data regarding citizenship rates would help to enforce these federal voting rights laws.

II. The Decennial Census Generates an Enormous Number of Responses and is Preferred by Federal Courts to Other Sources of Data.

In preparation for the 2020 census, the Census Bureau is compiling an address list for 140 million households.[6] If experience from 2010 is any guide, the

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[6] U.S. Census Bureau, 2020 Census: About, https://www.census.gov/programs-surveys/decennial-census/2020-census/about.html (last visited Mar. 4, 2019).

decennial census will generate a staggering number of responses. In the last census, "74 percent of households in the United States filled out and mailed back their 2010 Census questionnaire."[7] In addition, the "47 million households that did not mail back a census form by the deadline were visited by census takers in person." *Id.* Ultimately, the "Census Bureau either received a form or attempted repeated visits to 100 percent of the identified housing units in the country."[8] *Id.*

Data gathered from the decennial census is presumed accurate by federal courts. *See Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 932 (8th Cir. 2018) ("As an initial matter—and, as the district court noted—[t]he census is presumed accurate until proven otherwise.") (internal quotations omitted); *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 204 F.3d 1335, 1341 (11th Cir. 2000) (accuracy of census figures presumed until there is "competent evidence to the contrary."); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853-854 (5th Cir. 1999) (citation omitted) ("Census figures are presumed accurate until proven otherwise. Proof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override the presumptive correctness of the prior

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[7] Press Release, U.S. Census Bureau, Nation Achieves 74 Percent Final Mail Participation in 2010 Census (Oct. 21, 2010), https://www.census.gov/newsroom/releases/archives/2010_census/cb10-cn81.html.

[8] *Id.*

decennial census."); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 946 (7th Cir. 1988) ("The census is presumed accurate until proven otherwise."); *cf. Wis. v. City of New York*, 517 U.S. 1, 22 (1996) (upholding Secretary's rejection of "change from the traditional method of conducting the census" and approving "his establishment of a rebuttable presumption that the traditional method was the most accurate"). Given the extraordinary quantity of data gathered by the decennial census, this presumption makes sense.

At present, Judicial Watch obtains its citizenship data from the American Community Survey, which is just that—a yearly survey of about "3.5 million households across the country."[9] Data from the ACS is broken down into 1-year estimates "for geographic areas with populations of 65,000 or more," and 5-year estimates "[f]or geographic areas with smaller populations."[10]

A survey of 3.5 million individuals obviously is not as comprehensive as a survey of 140 million households. Indeed, federal courts discussing both sources have expressed an understandable preference for data from the decennial census where possible. In

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[9] U.S. Census Bureau, American Community Survey (ACS): Top Questions About the Survey, https://www.census.gov/programs-surveys/acs/about/top-questions-about-the-survey.html (last visited Feb. 11, 2019).

[10] U.S. Census Bureau, Understanding and Using American Community Survey Data: What All Data Users Need to Know 13 (July 2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/acs_general_handbook_2018.pdf.

Mo. State Conf. of the NAACP, a case involving a vote dilution claim under Section 2 of the Voting Rights Act, the Eighth Circuit upheld the district court's determination that data from the decennial census was more credible than that from the ACS. As the Court explained:

> [T]he district court noted that "The Census Bureau itself cautions against using ACS estimates rather than the Decennial Census complete count to determine the population of a given geographic area," and cited . . . the fact that the ACS had projected that the overall population of St. Louis would grow throughout the 2000s, only to be disproved when the actual data for the 2010 Census were collected. In light of these methodological limitations, the district court determined that the most reliable data available were the 2010 Census data.

894 F.3d at 932-933; *see Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451, 460 (N.D. Tex. 2010) ("the use of the ACS data [under Section 2] does not . . . meet the high standards and thorough coverage of the decennial census").[11]

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[11] District courts have relied on ACS data in the absence of better data. But such exceptions prove the rule, in that the use of data other than census data must be explained. *See, e.g., Rodriguez v. Harris Cnty., Texas*, 964 F. Supp. 2d 686, 727 (S.D. Tex. 2013) (ACS data was "sufficiently probative" where "the Census Bureau no longer collects citizen voting-age population data on the official Census forms" and citizenship data from the last decennial census more than ten years ago was "out-dated").

In a recent lawsuit brought under Section 8 of the NVRA, moreover, the district court raised specific concerns about the use of ACS data. In *Bellitto v. Snipes*, No. 16-cv-61474-BLOOM/Valle, 2018 U.S. Dist. LEXIS 103617 *29-30 (S.D. Fla. March 30, 2018), the district court observed that the ACS "excludes individuals living overseas . . . college students . . . as well as other seasonal residents registered in Broward County." These concerns do not apply equally to the decennial census. Because it is sent to every household, the decennial census is more likely to reach college students or seasonal residents wherever they reside. The decennial census also includes a particular program, the "Federally Affiliated Count Overseas (FACO) Operation" which "obtains counts by home state of U.S. military and federal civilian employees stationed or assigned overseas and their dependents living with them."[12]

As frequent litigants in NVRA cases, *amici* would like to present the kinds of evidence to federal judges that they find most convincing. Using decennial census data instead of ACS estimates would allow *amici* to do so.

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[12] 2020 Census Operational Plan 135 (Dec. 2018) (available at https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf).

III. It Would Be Better to Have More Citizenship Data.

Enlarging the available citizenship data with what is likely to be well over 100 million new data points consisting of responses to the decennial census must be to the great benefit of everyone—researchers, policy makers, courts, and litigants—who can use that information. Reliable data about citizenship is particularly important in the United States, where estimates suggest that the number of noncitizens may be significant. For example, the Department of Homeland Security "estimates that 12.0 million illegal aliens were living in the United States in January 2015."[13] It also estimates that there were at that time 24.5 million legal residents of foreign birth.[14]

As the Petitioners point out, the Department of Justice stated that the decennial census was "the most appropriate vehicle" for asking a question about citizenship. Cert. Pet. 3. The Secretary of Commerce agreed. *Id.* at 4. In so acting, the Secretary rejected the argument that including a citizenship question would reduce the response rate for noncitizens. *Id.* The Secretary found that the available data did not support this suggestion, and added that the value of "more complete and accurate" citizenship data

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[13] Department of Homeland Security, Population Estimates: Illegal Alien Population Residing in the United States: January 2015 2 (December 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

[14] *Id.* at 10 (Table A1-1, row 2.l).

outweighed the disadvantages that might arise from a lower response rate. *Id.*

The district court found the opposite, namely, that "that the citizenship question will cause a significant differential decline in self-response rates among noncitizen households." Pet. App. 150a. The district court also found that "the addition of a citizenship question to the 2020 census will harm the quality of the resulting census data regardless of whether it also leads to a net differential undercount of people who live in noncitizen and Hispanic households." Pet. App. 184a. Petitioners have pointed out that a determination about what to include on a census questionnaire is committed to agency discretion and is unreviewable under the Administrative Procedures Act ("APA"). Cert. Pet. 19. They also note that a court determining whether an agency action is arbitrary and capricious under the APA may not substitute its own judgment for that of the agency. *Id.* at 21. *Amici* join in these arguments.

There is, however, another fundamental problem with the district court's approach: It is unscientific. All data has limitations, which must be understood and accounted for. But to claim to know in advance both how and to what extent data is *likely* to be limited, and then to use that supposition to determine that the data must never be collected in the first place, is misguided. This is especially true where the data issues involved are complex and the domain of experts. But it is doubly true where the crucial variables affecting accuracy depend in part on one of the least predictable aspects of the natural world,

namely, human conduct (in particular, the likely changes in self-response rates).

The district court's approach is not just wrong, it is wrong-headed, because it has pre-judged the outcome of an experiment.[15] It is hard to believe that there is nothing to be learned about citizenship rates from analyzing over 100 million survey responses regarding that very subject. (Indeed, even the citizen responses alone would shed significant new light on the issue.) But regardless of what it shows, it is important to collect this data. If it coincides with and confirms the administrative estimates of the DHS and others, that will be an important finding, as it will suggest that the results are accurate. Yet, even if the data diverges from an existing estimate—either nationally or for a particular state—this will also be an important finding, raising critical questions as to whether one or the other, or *either* result is correct.[16]

The district court's decision implies that we are somehow better off with less data. That should never be assumed, but it is particularly inapt to do so where it is possible to obtain *so much* new data. For all of

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[15] *See* FRANCIS BACON, NOVUM ORGANON (Joseph Devey, ed., P.F. Collier, 1902) (1620) Aphorism LXX ("experience is by far the best demonstration"); Aphorism CIX ("men are wont to guess about new subjects from those they are already acquainted with, and the . . . fancies they have thence formed: than which there cannot be a more fallacious mode of reasoning").

[16] *See* FRANCIS BACON, THE ADVANCEMENT OF LEARNING 125 (William A. Wright, ed., Oxford Press, 1885) (1605) ("those experiments be not only esteemed which have an immediate and present use, but those principally which are of most universal consequence for invention of other experiments").

these reasons, the citizenship question should be included on the decennial census.

CONCLUSION

For the foregoing reasons, *amici* Judicial Watch and AEF respectfully request that the Court reverse the judgment of the District Court.

Respectfully submitted,

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